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NOTE AND COMMENT.

THE LATEST STEP IN THE EXPANSION OF THE COMMERCE CLAUSE OF THE FEDERAL CONSTITUTION.—The case of the *Southern Railway Company* v. *United States,* 32 Sup. Ct. 2, is the latest step in the expansion of the commerce clause. The railroad company insisted that cars used in moving intrastate traffic on a railway which was a highway of interstate commerce are not comprehended by the Safety Appliance Act of March 2nd, 1893 (27 STAT. AT L. 531, chap. 196; U. S. COMP. STAT. 1901, p. 3, 174), as amended by the act of March 2nd, 1903 (32 STAT. AT L. 943, chap. 976; U. S. COMP. STAT., Supp. 1909, p. 1, 143), and that, if cars used in intrastate traffic are so comprehended, the act is unconstitutional. The Safety Appliance Act, as amended, declares, *inter alia,* that its provisions and requirements shall "apply to all trains, locomotives, tenders, cars, and similar vehicles used on any railroad engaged in interstate commerce." The court held that Congress had the power, under the commerce clause of the Federal Constitution, to require, as it did in this act as amended, that all locomotives, cars, and similar vehicles used on any railway engaged in interstate commerce, shall be equipped with certain designated safety appliances, regardless of whether such vehicles are

used in moving intrastate or interstate commerce. Mr. Justice VAN DEVANTER, delivering the opinion of the court, says, "this is so, not because Congress possesses any power to regulate intrastate commerce as such, but because its power to regulate interstate commerce is plenary, and competently may be exerted to secure the safety of the persons and property transported therein and of those who are employed in such transportation, no matter what may be the source of the dangers which threaten it." In other words, in so far as Congressional regulation of intrastate commerce is essential to the efficient regulation of interstate commerce, it is justified by that section of the Federal Constitution which, after enumerating the power to regulate interstate commerce, added the power to make "all laws which shall be necessary and proper for carrying into execution the foregoing powers."

The above case settles a much mooted question, concerning which there have previously been many conflicting decisions. The opinion rendered is very short, covering less than two pages, and contains no citations. However, a review of the previous decisions not only shows the conflicting nature of those decisions, but reveals the principles which probably influenced the court in arriving at this decision.

One of the earliest cases opposed to the principal case was *United States* v. *Geddes*, 65 C. C. A. 320, 131 Fed. 452. This case was decided in 1904, one year after the last amendment of the Safety Appliance Act. The court held that that act did not apply to a road which was entirely within a State and which did not accept freight from an interstate carrier on through bills of lading. A year later the statute was held not to apply in a case in which there was "no proof that the engine and cars were engaged in interstate commerce." *Rosney* v. *Erie R. Co.*, 135 Fed. 311. In 1908 the Supreme Court of Colorado held that the terms of the Federal Safety Appliance Act were not applicable to a railroad located entirely within the State, when handling cars consigned from point to point therein. *Rio Grande Southern R. Co.* v. *Campbell*, 44 Colo. 1, 96 Pac. 986. The doctrine that "one who engages in interstate commerce, thereby submits all his business concerns to the regulating power of Congress," said Mr. Justice WHITE (see 207 U. S. 502), is one that is refuted by the statement of it. Merely because a railroad engages in interstate commerce does not "endow Congress with power not delegated to it by the Constitution; in other words, to legislate concerning purely State concerns." *Employer's Liability Cases*, 207 U. S. 463. In 1909 the above remarks of Mr. Justice WHITE were quoted by LANNING, District Judge, who added that "Congress has no power to regulate the equipment on cars not used or intended for use in interstate commerce, merely because they may be used on a railroad engaged in interstate commerce." The Safety Appliance Act cannot be so construed. *United States* v. *Erie R. Co.*, 166 Fed. 352. See also *United States* v. *Illinois Cent. R. Co.*, 166 Fed. 997. The most recent of this line of decisions held that the act applied to a car engaged in intrastate traffic but hauled in an interstate train (regardless of any direct physical connection with any interstate cars), because the danger to employees engaged in transportation of interstate traffic—whom it was the design of Congress to protect—is just as imminent as if the car was used in interstate

commerce. The court remarks, "and the obverse of that would seem to be that a train traveling wholly between points in the same State, and not going out of that State, and carrying commerce wholly originating in the State, destined to points in the same State, is not for the time being an instrument of interstate commerce." *Elgin, etc. R. Co.* v. *United States,* 168 Fed. 1; *Wabash, etc. R. Co.* v. *United States,* 168 Fed. 1. The inferior Federal courts in rendering these decisions were undoubtedly influenced by the analogy furnished by the Employer's Liability Cases, *supra,* and Mr. THORNTON in his excellent work on THE EMPLOYER'S LIABILITY AND SAFETY APPLIANCE ACTS, p. 163, says, "Of course, a car not used in interstate commerce does not come within the provisions of the statute."

On the other side of this question there is a line of decisions which may be considered to be the foundation for the decision in the principal case. Some of the decisions are not predicated on the same facts, but involve the decision of similar constitutional questions. "Commerce, in its simplest signification, means an exchange of goods; but in the advancement of society, labor, transportation, intelligence, care, and various mediums of exchange, become commodities and enter into commerce; the subject, the *vehicle,* the *agent,* and their various operations become the subjects of commercial regulations." Justice JOHNSON in *Gibbons* v. *Ogden,* 9 Wheat. 1, 6 L. Ed. 23. See also *Sherlock* v. *Alling,* 93 U. S. 99, 23 L. Ed. 819. "The power * * * embraces within its control all instrumentalities by which that commerce may be carried on." *Gloucester Ferry Co.,* v. *Pa.,* 114 U. S. 196, 5 Sup. Ct. 826, 29 L. Ed. 158. The purpose of the Safety Appliance Act is the protection of the lives and limbs of men, and such statutes should be construed to prevent the mischief and advance the remedy. *Chicago, etc. R. Co.* v. *Voelker,* 129 Fed. 521, 526. The primary object of the act was to secure "the safety of the employees and travelers." *Johnson* v. *Southern Pac. R. Co.,* 196 U. S. 1. Referring to the amendment of 1903 it has been said, "the later statute covers all cars used on any railroad engaged in interstate traffic, regardless of whether the particular car was for local or interstate use." *United States* v. *Chicago, M. & St. Ry. Co.,* 149 Fed. 486. Congress may lawfully affect intrastate commerce so far as necessary effectually and completely to regulate interstate commerce, because the Constitution reserved to Congress plenary power to regulate interstate commerce, and the Constitution and the acts of Congress in pursuance thereof are the supreme law of the land. *United States* v. *Colorado & N. W. R. Co.,* 157 Fed. 321. The clearest and most concise treatment this question has received is found in the opinion rendered by HUNDLEY, District Judge, upon the trial of the principal case in the lower court. It was there held that the act applies to the interstate highway as an instrument of commerce; and, Congress having taken affirmative action in reference thereto, its control of the interstate highway being thereby conclusive, the statute requiring vehicles running on the interstate highway to be provided with certain safety appliances embraces all uses of the highway, whether for the transportation of interstate traffic or for the transportation of traffic from a point within a State to another point within the same State by common carriers engaged in interstate commerce. *United States* v.

Southern R. Co., 164 Fed. 347. The United States Supreme Court in deciding the principal case practically adopted the above argument of the lower court.

A few decades ago the legal theories advanced in the principal case would probably have been severely criticised and regarded as a just cause for alarm. At the present time, these same theories, will, we think, be met with approbation by practically everyone. Moreover, there has been a great change in the personnel of our Supreme Court, and that tribunal is apparently becoming more responsive to the needs of our advancing civilization. If the position maintained in the principal case may be regarded as an indication of the adoption of a correspondingly advanced general policy, it should meet with double approval. P. P. F.

THE RIGHT OF A TRUSTEE OF A BANKRUPT PARTNERSHIP TO ADMINISTER THE INDIVIDUAL ESTATE OF AN UNADJUDICATED PARTNER AGAINST HIS WILL OR CONSENT.—The whole law of the bankruptcy of partnerships is in a state of transition, and therefore in great confusion: one point on which the courts are most hopelessly divided is this: when a partnership and some, but not all, of its members have been adjudicated bankrupt, can their trustee administer together with the partnership estate, the individual estate of a partner not adjudicated bankrupt, against his will?

The determination of this question depends entirely upon the construction to be given to Section 5, clauses a and h of the Bankruptcy Act of 1898. The precise point has arisen in four of the Circuit Courts of Appeals, and there is considerable variance in both the reasoning and the result of the decisions.

In the Second Circuit the question was determined for the first time in the case of *In re Meyer*, 98 Fed. 976, decided in 1899, wherein it was held: "That it is the scheme of these provisions to treat the partnership as an entity which may be adjudged a bankrupt by voluntary or involuntary proceeding, irrespective of any adjudication of the individual partners as bankrupt, and upon an adjudication to draw to the administration the individual estates of the partners as well as the partnership estate, and marshal and distribute them according to equity."

The question arose next in the Sixth Circuit in 1905 in the case of *Dickas* v. *Barnes*, 140 Fed. 849, where it was held that the court, in administering the estate of a bankrupt partnership, has power to take possession of the property of a partner, although he has not been, and could not be, adjudged a bankrupt individually, and to administer the same as far as necessary to the settlement of the partnership estate; the reason being that though a partnership is an entity, when that entity is declared bankrupt all its assets and resources are subject to the jurisdiction of the court, and as each partner is liable for the firm debts, his individual property stands charged as one of the resources of that entity; thus placing the Second and Sixth Circuits together in result, though not in reasoning.

In the Eighth Circuit, the question arose in 1907 in the case of *In re Bertenshaw*, 157 Fed. 363, where Judge SANBORN said, in construing these sec-